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Christopher J. Petri

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# **Don't Be Shocked if Missouri Applies Strict Products Liability to Electricity, But Should It?**

*Monroe v. Savannah Electric & Power Co.*<sup>1</sup>

## **I. INTRODUCTION**

In 1986, the Missouri Court of Appeals expressly chose not to decide whether strict products liability should be applied to electricity provided by an electric utility.<sup>2</sup> In *Monroe v. Savannah Electric & Power Co.*, the Supreme Court of Georgia answered this question and held that electricity is a product for strict products liability purposes.<sup>3</sup> The Georgia Supreme Court further found that the two critical factors in determining whether electricity is sold are its marketable condition and the manufacturer's relinquishment of exclusive control over the electricity.<sup>4</sup>

Inevitably, Missouri and other states which have not considered whether electricity is a product for strict products liability purposes, will have to decide the issue. The resolution of the issue is important because electricity causes approximately 1700 deaths and \$950,000,000 in property loss each year.<sup>5</sup>

## **II. FACTS AND HOLDING**

Monroe's decedent, Scott Ussery (hereinafter "Ussery"), was towing a shrimp boat to a dock when a metal pole came into contact with an overhead power line that supplied the dock with electricity.<sup>6</sup> Savannah Electric and Power Company (hereinafter "Savannah") owned the power line.<sup>7</sup> When Ussery stepped out of the vehicle, the electricity "grounded" through his body, killing Ussery.<sup>8</sup> The fuses installed by Savannah had not blown.<sup>9</sup> Neither party disputed that the electricity had not yet passed through the meter at the dock.<sup>10</sup>

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1. 471 S.E.2d 854 (Ga. 1996).

2. *Hills v. Ozark Border Elec. Coop.*, 710 S.W.2d 338, 339 (Mo. Ct. App. 1986).

3. *Monroe*, 471 S.E.2d at 856.

4. *Id.*

5. Roger W. Holmes, Note, *Strict Products Liability For Electric Utility Companies: A Surge in The Wrong Direction*, 29 SUFFOLK U. L. REV. 161, 161 n.1 (1995).

6. *Monroe*, 471 S.E.2d at 855.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

Monroe sued Savannah on a strict products liability claim.<sup>11</sup> Monroe argued that the electricity had been "sold" within the meaning of Georgia's strict liability statute because it had been delivered to the consumer's property for use.<sup>12</sup> On the other hand, Savannah argued that the electricity had not been sold because it had not passed through the electric power meter at the dock.<sup>13</sup> The trial court held that, even if the electricity were a "product" within the meaning of Georgia's strict liability statute, the electricity had not been sold because it had not passed through the meter at the dock.<sup>14</sup> Therefore, the trial court granted Savannah's motion for partial summary judgment on the strict liability claim.<sup>15</sup> The court of appeals affirmed, holding that electricity could be considered a "product" within the meaning of Georgia's strict liability statute, but because the electricity had not passed through the electric power meter, there had been no sale as required by the statute.<sup>16</sup>

The Supreme Court of Georgia granted certiorari to consider the questions of (1) whether electricity is a product within the meaning of Georgia's strict liability statute, and (2) if so, at what point the utility has sold the electricity.<sup>17</sup> The Supreme Court held that electricity was a product within the meaning of Georgia's strict liability statute,<sup>18</sup> and that the manufacturer's relinquishment of exclusive control over the electricity and the useable or marketable condition of

11. *Id.*

12. *Monroe v. Savannah Elec. & Power Co.*, 465 S.E.2d 508, 510 (Ga. Ct. App. 1995). GA. CODE ANN. § 51-1-11(b)(1) (Supp. 1996) provides that:

[t]he manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, . . . to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury . . . because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

13. *Monroe*, 465 S.E.2d at 509.

14. *Id.*

15. *Id.*

16. *Monroe*, 471 S.E.2d at 855.

17. *Id.* at 855. The court expressly passed on the question of when electricity contains a defect. *Id.* at 855 n.1.

18. *Id.* at 855-56. (citing *Bryant v. Tri County Elec. Membership Corp.*, 844 F. Supp. 347, 349 (W.D. Ky. 1994); *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641, 643 (Wis. 1979); *Elgin Airport Inn, Inc. v. Commonwealth Edison Co.*, 410 N.E.2d 620, 624 (Ill. App. Ct. 1980)). The Georgia Supreme Court also noted that electricity has been deemed a product not merely because it can be produced, confined, controlled, transmitted and distributed into a stream of commerce, but also because "it is artificially manufactured, can be measured, bought and sold, changed in quantity or quality, delivered wherever desired and is subject to larceny." *Id.* at 855 (quoting *Elgin*, 410 N.E.2d at 624).

the electricity are the two essential factors in determining whether the electricity has been sold.<sup>19</sup> Because the evidence established that the two critical factors were absent, the court further held that the electricity had not been sold within the meaning of the Georgia strict liability statute.<sup>20</sup>

### III. LEGAL BACKGROUND

#### *A. Negligence as the Standard of Tort Liability for an Electric Company Before the Advent of Strict Products Liability*<sup>21</sup>

Before strict products liability existed, courts used negligence analysis to determine the liability of an electric utility.<sup>22</sup> Generally, to succeed on a

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19. *Id.* at 856-57. The court refused to adopt the bright line rule that electricity is sold when it has passes through the electric meter for purposes of determining the amount of electricity sold to the consumer. *Id.*

20. *Id.* at 857. The court accordingly affirmed the judgment of the court of appeals. *Id.* The court noted that the evidence established that the electricity was in an unmarketable state at the time of the electrocution, that no consumer at the dock (or anyone who might reasonably and foreseeably be expected to encounter the electricity) had yet controlled the electricity, and Savannah had not relinquished its exclusive control over it. *Id.* at 856.

21. Plaintiffs have also used claims of strict liability based on abnormally dangerous behavior and claims of strict warranty liability against electric utilities. *See* Holmes, *supra* note 5, at 167-75. Courts have generally refused to apply strict liability based on abnormally dangerous behavior to electric utilities. *Id.* at 174. *See, e.g.,* G & K Dairy v. Princeton Elec. Plant Bd., 781 F. Supp. 485, 490 (W.D. Ky. 1991); Wirth v. Mayrath Indus., 278 N.W.2d 789, 793-94 (N.D. 1979). But, some courts have held that electricity can be subject to warranty liability after it passes through the meter. Holmes, *supra* note 5 at 168-69. *See, e.g.,* Helvey v. Wabash County REMC, 278 N.E.2d 608, 610 (Ind. Ct. App. 1972).

22. *See* Arkansas Power & Light Co. v. Lum, 262 S.W.2d 920, 924 (Ark. 1953) (there can be no recovery against an electric company in the absence of a breach of some duty owing to the injured person); Naki v. Hawaiian Elec. Co., 442 P.2d 55, 57 (Haw. 1968) (court required fault, specifically that defendant electric company owed the plaintiff a duty and failed to fulfill that duty, in order for defendant to be liable for furnishing electricity); Weissert v. City of Escanaba, 299 N.W. 139, 143 (Mich. 1941) (holding that liability of an electric company is governed by the principles of negligence, and no liability to respond in damages will attach in the absence of negligence on the part of the company or its employees); Martin v. Northern States Power Co., 72 N.W.2d 867, 870 (Minn. 1955) (the liability of a purveyor of electricity is grounded in negligence); Hamilton v. Laclede Elec. Coop., 294 S.W.2d 11, 15 (Mo. 1956) (liability of an electric utility rests upon negligence); Hall v. Loraine-Medina Elec. Coop., Inc., 148 N.E.2d 232, 234 (Ohio Ct. App. 1957) (while an electric company is liable for its negligence, it is not an insurer of the safety of those who come in contact with its wires); Havron v.

negligence claim, the plaintiff must show a breach of duty owed to another which causes damage to the other.<sup>23</sup> Courts have applied the negligence doctrines of proximate causation,<sup>24</sup> contributory negligence,<sup>25</sup> and *res ipsa loquitur*,<sup>26</sup> to electric utilities. Regarding the breach of duty element of a negligence action, courts have often assigned electric utilities a higher degree of care commensurate with their dangerous activities. Similarly, courts have also imposed specific duties upon electric utilities, including a duty to inspect and maintain their power lines, a duty to isolate or insulate transmission lines when

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Sequachee Valley Elec. Coop., 204 S.W.2d 823, 824 (Tenn. Ct. App. 1947) (distributor of electric current will not be held liable without negligence); *See also*, *Mania v. Potomac Elec. Power Co.*, 268 F.2d 793, 797 (4th Cir. 1959); *Hale v. Montana-Dakota Util. Co.* 192 F.2d 274, 276 (8th Cir. 1951) (electric company owes a duty commensurate with the danger involved, but is not insurer); *Alabama Power Co. v. Berry*, 48 So. 2d, 231, 234 (Ala. 1950); *Florida Power & Light Co. v. Brinson*, 67 So. 2d 407, 410 (Fla. 1953); *LeMaitre v. Union Elec. Power Co.*, 73 N.E.2d 125, 127 (Ill. App. Ct. 1947); *Kentucky Util. Co. v. Young*, 247 S.W.2d 978, 979 (Ky. 1952); *Calton v. Louisiana Power & Light Co.*, 56 So. 2d 862, 865 (La. Ct. App. 1952); *Edgerton v. H.P. Welch Co.*, 74 N.E.2d 674, 678 (Mass. 1947); *Henson v. Washington Water Power Co.*, 5 P.2d 1025, 1027 (Wash. 1931).

23. *See* RESTATEMENT (SECOND) OF TORTS SECTION 281 (1965).

24. *See, e.g., Weissert*, 299 N.W. at 143 (in determining the liability of an electric company for personal injury, as in other negligent actions, the test for proximate causation is whether the accident might have reasonably been foreseen by a person of ordinary intelligence and prudence); *Sizemore v. Montana Power Co.*, 803 P.2d 629, 635 (1990) (holding that the determination of proximate cause is based upon whether the consequences of the breach were reasonably foreseeable by the defendant, and noting that an electric company cannot be liable absent proximate cause).

25. *See, e.g., Hale*, 192 F.2d at 278 (barring recovery when plaintiff was carrying rod and failed to shorten it or keep it on one side of electrical wires); *Hamilton*, 294 S.W.2d at 17 (barring recovery because of plaintiff's contributory negligence in failing to pay attention to wires and not taking any precautions to prevent contact with wires); *Hanson*, 5 P.2d at 1027 (boy climbing fence and electric tower held contributorily negligent when electrocuted by power lines).

26. *See* Louis Lawrence Boyle, *Electrifying Solutions for the Shocking and Disparate Treatment of Electricity Within Products Liability Law*, Comment, 93 DICK. L. REV. 851, 866-67 (1989) (noting that the three requirements for proving *res ipsa loquitur* are that: (1) the event must be one which does not ordinarily occur in the absence of negligence; (2) the damage must be caused by an agent or instrumentality within the exclusive control of the defendant; and (3) the damage must not have been due to any voluntary action or contributory negligence on the part of the plaintiff). Boyle also notes that plaintiffs have turned to *res ipsa loquitur* in actions against electric companies because of difficulties in proving causation. *Id* at n.108; *See* Holmes, *supra* note 5, at 167. *See, e.g., Read v. Southern Pine Elec. Power Ass'n*, 515 So. 2d 916, 920 (Miss. 1987) (applying *res ipsa loquitur* to electric utility).

persons may foreseeably come in contact with them, and a duty to warn the public of any foreseeable danger in contacting power lines.<sup>27</sup>

***B. The Majority Position and Its Rationale—Electricity is a Product for Strict Products Liability Purposes<sup>28</sup>***

In 1965, the Second Restatement of Torts, which included Section 402A, *Special Liability of Seller of Product for Physical Harm to User or Consumer*,<sup>29</sup> was adopted. Since then, jurisdictions have struggled with the issue of whether electricity is a product for strict products liability purposes.<sup>30</sup>

The first court to deem electricity a product for strict products liability purposes was the Supreme Court of Wisconsin in *Ransome v. Wisconsin Electric Power Co.*<sup>31</sup> In *Ransome*, an electricity overload destroyed the plaintiff's

27. Holmes, *supra* note 5, at 163-64. National electrical safety standards also can provide a means for establishing the requisite duty of care. Holmes, *supra* note 5, at 165. See also Boyle, *supra* note 26, at 865-66.

28. Electricity has been held to be a "good" for warranty actions. Holmes, *supra* note 5 at 168. See, e.g., *Helvey*, 278 N.E.2d at 610. Courts have also held electricity to be "property" or a "commodity" for other types of actions. Holmes, *supra* note 5, at 176-77. See Boyle, *supra* note 26, at 853, 855. See, e.g., *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1181-82 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) (holding electricity to be a commodity under the Robinson-Patman Act); *People v. Menagas*, 11 N.E.2d 403, 407 (Ill. 1937) (holding that electricity is within an Illinois larceny statute); but the focus of *Monroe* and of this note is whether electricity is a product for strict products liability purposes.

29. Section 402A reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS SECTION 402A (1965).

30. See *infra* the text accompanying notes 31-61. See also Holmes, *supra* note 5, at 175; Boyle, *supra* note 26, at 855; Earnest Baynard, *Should Strict Products Liability Apply to the Sale of Electricity?*, 55 TENN. L. REV. 317, 320-21 (1988).

31. *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641, 648 (Wis. 1979).

house.<sup>32</sup> The defendant electric power company argued that, as a general matter, strict liability in tort should not apply to the sale of electricity.<sup>33</sup> The court held that while the distribution of electricity might be a service, the electricity, in and of itself, is a consumable product.<sup>34</sup> Although the court noted the social policy justifications for strict products liability,<sup>35</sup> it based its decision on the notion that electricity is "a form of energy that can be made or produced by men, confined, controlled, transmitted, and distributed . . . ."<sup>36</sup> Many courts have followed the "produced, controlled, transmitted rationale" of *Ransome*.<sup>37</sup>

Within the majority that considers electricity a product for strict products liability purposes, there are jurisdictions which use a different rationale than that used in *Ransome*. These courts have made their decision based on public policy

32. *Id.* at 643.

33. *Id.* at 647. The court noted that the defendant's argument was based upon *Kemp v. Wisconsin Electric Power Co.*, 172 N.W.2d 161 (1969). However, the court noted that in *Kemp* the plaintiff had touched an electrical power line but was denied recovery because the electricity had not been sold. *Ransome*, 275 N.W.2d at 647. Therefore, the court characterized the defendant's reliance upon *Kemp* as mistaken because *Kemp* implies that electricity is a product which can be sold for strict products liability purposes. *Id.* at 647-48.

34. *Id.* at 643.

35. *Id.* at 647.

36. *Id.* at 643.

37. See *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1054 (Colo. 1987) ("[S]uffice it to say [electricity] is a form of energy that can be made or produced by men, confined, [and] controlled . . . ." (quoting *Ransome*, 275 N.W.2d at 648)); *Carbone v. Connecticut Light & Power Co.*, 482 A.2d 722, 723-24 (Conn. Super. Ct. 1984) (citing *Ransome* and holding that as a matter of law a strict products liability complaint in which electricity was the product could not be stricken as not stating a proper cause of action); *Aversa v. Public Serv. Elec. & Gas Co.*, 451 A.2d 976, 979-80 (N.J. Super. Ct. App. Div. 1982) (noting the produced, controlled, moved rationale of both *Ransome* and *Elgin*, and holding that electricity is a product for strict products liability purposes); *Schriner v. Pennsylvania Power & Light Co.*, 501 A.2d 1128, 1132-33 (Pa. Super. Ct. 1985) (quoting *Ransome* and agreeing that electricity can be a product within the meaning of Section 402A); *Houston Lighting & Power Co. v. Reynolds* 765 S.W.2d 784, 785 (Tex. 1988) ("We agree with the better reasoned jurisdictions which hold electricity to be a product. Electricity is a commodity, which like other goods can be manufactured, transported and sold."); see also, *Elgin Airport Inn, Inc. v. Commonwealth Edison Co.*, 432 N.E.2d 259, 262 (Ill. 1982) (Supreme Court of Illinois chose not to reach the question of whether electricity was a product, but reversed the appellate court, which had stated in *Elgin Airport Inn, Inc. v. Commonwealth Edison Co.*, 410 N.E.2d 620, 624 (Ill. App. Ct. 1980), that "[h]aving in mind that electrical energy is artificially manufactured, can be measured, bought and sold, changed in quantity, delivered wherever desired . . . we are of the opinion that it is a product with the meaning of section 402A . . . .").

considerations.<sup>38</sup> For example, *Pierce v. Pacific Gas & Electric Co.* is a leading case using public policy analysis to justify the application of strict products liability to electricity. In *Pierce*, electricity supplied by the Pacific Gas and Electric Company (hereinafter "PG & E") shocked the plaintiff.<sup>39</sup> The plaintiff brought an action alleging strict liability in tort for defective products.<sup>40</sup> The defendant argued that electricity is merely the motion of charged ions rather than a product.<sup>41</sup> The court stated that "[w]e readily acknowledge that PG & E's liability should not depend simply upon whether electricity is or is not labeled a 'product.' More significantly, we believe the policy justifications for strict liability in tort support its imposition in this case."<sup>42</sup>

The court then identified four grounds for strict products liability: (1) to provide a "short-cut" to liability where negligence may be present but difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce the reallocation of resources toward safer products; and (4) to spread the risk of loss among all persons who use the product.<sup>43</sup> The court then applied the four factors to the situation at hand.<sup>44</sup> Regarding the "short-cut" in proving negligence, the court noted that the plaintiff would have to put on technical evidence far beyond the knowledge of the average juror; therefore, the plaintiffs would need to employ expert testimony.<sup>45</sup> However, the expert witnesses who can explain the technical aspects of electricity systems are concentrated within the industry itself and may be reluctant to serve as witnesses on the plaintiff's behalf.<sup>46</sup> Regarding the incentive for improved economic safety, the court noted that, especially in a case where a huge surge in electricity is traced to a defective transformer, imposition of strict products liability provides an incentive for utilities to avoid accidents before they occur by investing in safer products.<sup>47</sup>

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38. See *infra* notes 42-48 and accompanying text.

39. *Pierce v. Pacific Gas & Elec. Co.*, 212 Cal. Rptr. 283, 285 (Ct. App. 1985).

40. *Id.*

41. *Id.* at 288-90.

42. *Id.* at 291.

43. *Id.*

44. *Id.* at 291-92. It is important to note that in *Pierce*, the surge in electricity was traceable to a defective transformer. *Pierce*, 212 Cal. Rptr. at 291. However, California courts subsequent to the *Pierce* decision have held electricity to be a product, even when there was no evidence of defective electrical equipment. See *Mancuso v. Southern Cal. Edison Co.*, 283 Cal. Rptr. 300, 308 (Ct. App. 1991). In *Mancuso*, the court cited both *Ransome* and *Pierce* and held that electricity supplied by electric company is a product. The court reviewed the public policy analysis of *Pierce* and held that lightning generated electricity is not a product because it has not been marketed or placed in the stream of commerce by the electric company. *Id.* at 306-09.

45. *Pierce*, 212 Cal. Rptr. at 291.

46. *Id.*

47. *Id.* at 291-92.



Finally, regarding the spreading of the risk of loss to all users of the product, the court noted that "strict liability in tort spreads the costs of personal injuries among millions of consumers of electricity instead of imposing those costs upon blameless victims chosen by chance."<sup>48</sup>

Other courts have used policy analysis similar to that of *Pierce* to conclude that electricity is a product,<sup>49</sup> while still other courts have concluded that electricity is a product for strict products liability purposes based on case law dealing with electricity in other causes of action.<sup>50</sup>

### *C. The Minority Position and Its Rationale—Electricity Is a Service for Strict Products Liability Purposes*

Representative of the cases which have declined to hold that electricity is a product for strict liability purposes is *Otte v. Dayton Power & Light Co.* In *Otte*, stray voltage coming from Dayton Power and Light Company's (hereinafter "DP&L") wires harmed the plaintiff's cows.<sup>51</sup> The plaintiffs sued DP&L for strict products liability, *inter alia*.<sup>52</sup>

The Ohio Supreme Court rejected the application of strict products liability on alternate rationales.<sup>53</sup> First, the court reasoned that electricity is not a product within the meaning of section 402A of the Second Restatement.<sup>54</sup>

48. *Id.*

49. See *Bryant v. Tri-County Elec. Membership Corp.*, 844 F. Supp. 347, 352 (W.D. Ky. 1994) (holding that Kentucky courts would probably conclude that imposing strict liability upon electric utilities would advance the policies of spreading risk among all product consumers and discouraging the sale of defective goods).

50. See *Petroski v. Indiana Pub. Serv. Co.*, 354 N.E.2d 736, 747 (Ind. Ct. App. 1976) ("Electricity is a product which can be sold within the meaning of Section 402A."). The *Petroski* court cited *Helvey v. Wabash County REMC*, 278 N.E.2d 608 (Ind. Ct. App. 1972). *Petroski*, 354 N.E.2d at 747. The *Helvey* court held that electricity was a "good" within the meaning of the Uniform Commercial Code because electricity was an existing thing that was movable. *Helvey*, 278 N.E.2d at 610.

51. *Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 836 (Ohio 1988). "Neutral to earth voltage [referred to as stray voltage] is the measurement at any given time and place of electricity trying to return from where it came, either through the earth or through the primary neutral wire . . . [s]ometimes, because of changes in resistance on the primary neutral, electricity returning home from one user will get off the primary neutral onto another user's secondary neutral, ground itself and then return home through the earth." *Id.* "[S]tray voltage is a normal and natural condition which is common to every power distribution system in this country." *Id.* at 839.

52. *Id.* at 837.

53. *Id.* at 838.

54. *Id.*

A "product" is anything made by human industry or art. Electricity appears to fall outside this definition. This is so because electricity is the flow of electrically charged particles along a conductor. DP & L does not manufacture electrically charged particles, but rather, sets in motion the necessary elements that allow the flow of electricity. What we have here is a purported defect in a distribution system. Such a system is, in our view, a service.<sup>55</sup>

Secondly, the court reasoned that the public policies supporting strict liability are not viable in an action against a highly regulated public utility.<sup>56</sup> The court noted that the risk allocation and cost spreading rationales are only applicable when the industry affected may pass its costs on to the general public.<sup>57</sup> The court reasoned that the rationales would not be effective for a public utility which may only establish price increases after getting administrative approval.<sup>58</sup> The court conceded that strict products liability can create an incentive for safer products. Nonetheless, the court concluded that it was doubtful that the imposition of strict liability would lead to a safer distribution system because public utilities already are regulated by the National Electric Safety Code (NESC).<sup>59</sup>

New York, for one, has extended the dual rationale of *Otte* to non-stray voltage situations.<sup>60</sup> Other jurisdictions, while not analyzing the properties of electricity nor the strict products liability policies, have, in a perfunctory fashion, declined to apply strict liability to electric companies.<sup>61</sup> Finally, some jurisdictions, while not making a broad holding, have declined to apply strict products liability to electric utilities in specific situations.<sup>62</sup>

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55. *Id.* The court then went on to give reasons why, especially in a stray voltage case, electricity is not a product. *Id.*

56. *Otte*, 523 N.E.2d at 841.

57. *Id.*

58. *Id.*

59. *Id.* at 842.

60. *See Bowen v. Niagara Mohawk Power Corp.*, 590 N.Y.S.2d 628, 631-32 (App. Div. 1992) (extending the dual rationale of *Otte* to situations involving voltage that is not stray).

61. *See Rodgers v. Chimney Rock Pub. Power Dist.*, 345 N.W.2d 12, 15-16 (Neb. 1984) (rejecting plaintiff's argument that electricity is a product for strict liability purposes); *Wood v. Public Serv. Co.*, 317 A.2d 576, 579-80 (N.H. 1974) ("No compelling reason of policy or logic has been advanced to apply strict liability to electric companies.").

62. *See G & K Dairy v. Princeton Elec. Plant Bd.*, 781 F. Supp. 485, 489 (W.D. Ky. 1991) (holding that electricity is a service in a stray voltage situation). *Bryant* later limited *G & K Dairy* to stray voltage situations. *Bryant v. Tri-County Elec. Membership Corp.*, 844 F. Supp. 347, 351 (W.D. Ky. 1994). *See also Martinez v. Grant County Pub. Util.*, 851 P.2d 1248, 1250 (Wash. Ct. App. 1993) ("Washington recognizes the societal

***D. Provided that Electricity Is a Product for Strict Products Liability Purposes, at What Point Has the Utility Sold the Electricity?***

Although the Second Restatement calls for a sale of a product in order for strict products liability to apply,<sup>63</sup> most courts hold that strict products liability

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necessity of transmitting lethal amounts of electricity through uninsulated power lines through rural areas; it does not impose strict liability on electrical power companies for injuries arising out of contact with those power lines.”); *Koplin v. Pioneer Power & Light Co.*, 453 N.W.2d 214, 219 (Wis. Ct. App. 1990) (holding that *Ransome* is inapplicable in a case dealing with stray voltage and agreeing with the *Otte* reasoning that stray voltage is not a product).

63. Section 402A reads “One who sells any product in a defective

is applicable to electricity when the utility places the electricity into the stream of commerce.<sup>64</sup> But whether courts use "sale" or "stream of commerce" language, the important determination to be made is the point in the distribution system at which electricity will be subject to strict products liability.

A plurality of jurisdictions have followed *Ransome* and held that electricity is sold (or placed into the stream of commerce) when it enters the customer's meter.<sup>65</sup> However, other jurisdictions have used a variety of tests.<sup>66</sup> In *Smith v. Home Light & Power Co.*, the court used a consumable or marketable voltage test.<sup>67</sup> The plaintiffs argued that once the electricity entered the distribution line which terminated at their dairy barn, the utility had released it into the stream of commerce.<sup>68</sup> The court rejected this argument reasoning that because the electricity had not yet passed through the electric company's transformer, which reduced the 7200 volt power to a level suitable for use in the dairy farm, the utility had not sold the electricity.<sup>69</sup> The court in *Petroski v. Indiana Public Service Co.* enunciated another test: electricity is not in the stream of commerce until it reaches its destination in a home or factory.<sup>70</sup> Perhaps the most

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condition . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer." RESTATEMENT (SECOND) OF TORTS SECTION 402A (1965).

64. Holmes, *supra* note 5, at 189; *Petroski v. Indiana Pub. Serv. Co.*, 354 N.E.2d 736, 747 (Ind. Ct. App. 1976) (holding that the test is not whether there has been a technical sale, but rather whether the product has been placed in the stream of commerce); See, e.g., *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1055 (Colo. 1987); *Aversa v. Public Serv. Elec. & Gas Co.*, 451 A.2d 976, 980 (N.J. Super. Ct. App. Div. 1982); *Schriner v. Pennsylvania Power & Light Co.*, 501 A.2d 1128, 1133 (Pa. Super. Ct. 1985).

65. *Ransome*, 275 N.W.2d at 643 ("[E]lectricity leaves control of Wisconsin Electric Power Company at the point in distribution system where a customer's conductors are connected to the company's conductors, namely at the electric meter . . . '[s]ale' of electricity takes place at the meter . . ."); *Bryant v. Tri-County Elec. Membership Corp.*, 844 F. Supp. 347, 352 (W.D. Ky. 1994). *Schriner v. Pennsylvania Power & Light Co.*, 501 A.2d 1128, 1134 (Pa. Super. Ct. 1985). See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 at cmt. d (Tentative Draft No. 2, Mar. 13, 1995), which indicates that a majority of courts hold that electricity is a product when it passes through the customer's meter. But cf., *SmithBower v. Southwest Cen. Rural Elec. Coop. Inc.*, 542 A.2d 140, 146 (Pa. Super. Ct. 1988) (holding that plaintiffs could not collect on strict products liability action because the electricity had not reached the meter of the building near where the plaintiff's were moving farm equipment, even though the electricity had been sold from an electric utility to an electric cooperative before reaching the plaintiffs).

66. See *infra* notes 68-76 and accompanying text.

67. See *infra* note 69 and accompanying text.

68. *Smith*, 734 P.2d at 1055.

69. *Id.*

70. *Petroski*, 354 N.E.2d at 747. In *Petroski*, a boy had touched an electrical

unfavorable test to electric utilities was given in *Houston Lighting & Power Co. v. Reynolds*.<sup>71</sup> The court held that electricity in the process of being delivered to the consumer through the power company's transmission lines is in the stream of commerce.<sup>72</sup>

Other courts have applied less precise tests.<sup>73</sup> For example, in *Aversa v. Public Service Electric & Gas Co.*, the court chose not to apply a strict meter test and held that "evidence that an electric company relinquished exclusive control over its product may establish strict liability at a point prior to its running through a meter where charges are computed."<sup>74</sup> Finally, some courts have used a combination of the above tests.<sup>75</sup> In *Public Service Indiana, Inc. v. Nichols*, the court held that, in order for electricity to be released into the stream of commerce, it had to reach its destination in a home or factory and had to be reduced from a transmission voltage to a consumption voltage.<sup>76</sup>

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distribution wire located in the upper branches of a tree. *Id.* at 739. Because this electricity had clearly not reached its destination in a home or factory, the case offers no insight as to specifically when or where electricity must reach its destination in a home or factory.

71. See *infra* note 72 and accompanying text.

72. *Houston Lighting & Power Co. v. Reynolds* 765 S.W.2d 784 (Tex. 1988) (the court noted that once electricity is in the transmission lines it cannot be recalled or restored).

73. See *infra* note 74 and accompanying text.

74. *Aversa v. Public Serv. Elec. & Gas Co.*, 451 A.2d 976, 980 (N.J. Super. Ct. App. Div. 1982) (the court then remanded the case for fact finding regarding the sale of the electricity). For the subsequent development of California law on this issue see *Pierce v. Pacific Gas & Elec. Co.*, 212 Cal. Rptr. 283, 283 (Ct. App. 1985) (stating that in most cases for electricity to be sold, "it must be delivered to the consumer's premises, to the point where it is metered, although the many variations in electrical systems prevent our drawing a 'bright line' at a particular point); *Mancuso v. Southern Cal. Edison Co.*, 283 Cal. Rptr. 300, 308 (Ct. App. 1991) ("[T]he test is whether the electricity has been metered."); *Stein v. Southern Cal. Edison Co.*, 8 Cal. Rptr. 2d 907, 910 (Ct. App. 1992) (stating that "although passing through the customer's meter will generally indicate when electricity has been sold there are other ways electricity may be found to have left the control of the utility company . . . we . . . decline to delineate the particular point at which it can be said that electricity enters the stream of commerce," and holding that when electricity had blown up meter before a sale could be registered, the electricity had entered the stream of commerce).

75. See *infra* note 76 and accompanying text.

76. *Public Serv. Ind., Inc. v. Nichols*, 494 N.E.2d 349, 355 (Ind. Ct. App. 1986). See *Houston Lighting and Power v. Reynolds*, 765 S.W.2d 784, 785-86 (Tex. 1988), where the court appears to combine the consumable voltage test with the meter test by holding that contact with overhead power lines does not come within the purview of Section 402A and indicating that until the process of transforming the electricity from 35,000 volts to 110-220 volts "was completed, the electricity was not transferred from

## IV. INSTANT DECISION

In *Monroe v. Savannah Electric & Power Co.*,<sup>77</sup> the Supreme Court of Georgia adopted the majority position that electricity is a product for strict products liability purposes.<sup>78</sup> After noting that the question was one of first impression in Georgia, the court held that electricity is a product because it "can be produced, confined, controlled, transmitted and distributed in the stream of commerce"<sup>79</sup> and because it is "artificially manufactured, can be measured, bought and sold, changed in quantity or quality, delivered wherever desired and [is subject to larceny]."<sup>80</sup> The court expressly rejected the reasoning of *Otte v. Dayton Power & Light Co.*<sup>81</sup>

Regarding the point at which electricity may be considered sold for strict products liability purposes, the court rejected a rigid meter test.<sup>82</sup> Instead, the court held that the two factors which determine whether electricity is sold for strict products liability purposes are whether the manufacturer has relinquished exclusive control over the product and whether the product is in a useable or marketable condition.<sup>83</sup>

In applying the law to the facts, the court noted that the evidence established that, at the point where Ussery came into contact with the electricity,

HL & P's transmission line *through a meter* to the lines of a customer."

77. 471 S.E.2d 854 (Ga. 1996).

78. *Id.* See also *infra* notes 79-80 and accompanying text.

79. *Monroe*, 471 S.E.2d at 855 (quoting *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641, 643 (Wis. 1979)).

80. *Id.* (quoting *Elgin Airport Inn, Inc. v. Commonwealth Edison Co.*, 410 N.E.2d 620, 624 (Ill. App. Ct. 1980)).

81. *Id.* at 855-56. In *Otte*, the court reasoned that electricity was not a product because it was not manufactured, and the court also reasoned that applying strict product liability to electricity would be unwise on policy grounds. *Otte*, 523 N.E.2d at 838, 841-842.

82. *Monroe*, 471 S.E.2d at 856. The court therefore refused to join the plurality which holds that electricity is sold only when it reaches the customer's meter. See *supra* note 65 and accompanying text.

83. *Id.* at 856-57. The court did not indicate whether this was a conjunctive or disjunctive analysis. By using the marketable condition of the electricity and the manufacturer's exclusive control as the two critical factors, it appears that the court is combining the reasoning of *Aversa* and *Smith*. In *Aversa*, the court stated "evidence that an electric company relinquished exclusive control over its product may establish strict liability at a point prior to its running through a meter where charges are computed." *Aversa v. Public Serv. Elec. & Gas Co.*, 451 A.2d 976, 980 (N.J. Super. Ct. App. Div. 1982). In *Smith*, the court held that electricity is not sold until it is reduced to a suitable voltage for consumption. *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1055 (Colo. 1987).

it had already passed through one transformer at the edge of the property; however, despite this initial step-down in voltage, the electricity was electrical energy in an unmarketable state and unmarketed state.<sup>84</sup> The evidence further established that the electricity that Usery encountered was not under the exclusive control of any consumer at the dock or anyone who reasonably and foreseeably might have been expected to encounter it.<sup>85</sup> In addition, the evidence demonstrated that Savannah had not relinquished its exclusive control over the electricity.<sup>86</sup> Given the absence of these two critical factors, the court held that the electricity was not sold for strict products liability purposes and affirmed the judgment of the appellate court.<sup>87</sup>

## V. COMMENT

The court in *Carbone v. Connecticut Light & Power Co.* was correct when it stated, "[I]n considering whether electricity is a 'product' within the products liability statute . . . the issue is not so much semantic, but rather the underlying social policy as whether the doctrine of strict [products] liability . . . should be made available to one sustaining social damage as a result of . . . electric voltage . . . ."<sup>88</sup>

The *Ransome* rationale that electricity is a product because electric utilities can produce, control, and transmit it<sup>89</sup> is unpersuasive. Likewise, the *Otte* rationale that electricity is not a product because electricity is merely the flow of electrically charged particles along a conductor, which the electric company does not manufacture, but merely sets in motion, is equally unpersuasive.<sup>90</sup> Instead, courts should focus on whether the application of strict products liability to electricity would serve the public policies that the doctrine of strict products liability was created to address.

84. *Id.* at 857.

85. *Id.*

86. *Id.*

87. *Id.* Because the electricity had not been sold, the court refused to reach the question of whether the electricity had a defect. *Id.* at 855. Courts have had trouble deciding what makes electricity defective. See Holmes, *supra* note 5 at 179-80. Some courts have held that electricity which reaches a customer's meter at an abnormally high voltage is defective while others have focused on whether the electricity reached the consumer as the electric utility intended. See Holmes, *supra* note 5 at 181-82.

88. *Carbone v. Connecticut Light & Power Co.*, 482 A.2d 722, 723 (Conn. Super. Ct. 1984).

89. *Ransome*, 275 N.W.2d at 643.

90. *Otte*, 523 N.E.2d at 838. The courts in *Ransome* and *Otte* seem to be quibbling over the meaning of the word "manufacture." Rather than quibbling over abstract definitions, the issue should be decided using policy analysis.

Proponents of strict products liability believe that it increases social utility by satisfying the following main objectives: promoting loss spreading, discouraging consumption of hazardous products, and encouraging investment in product safety.<sup>91</sup> Applying strict products liability to electricity does not serve any of these objectives.<sup>92</sup>

The regulation of public utilities diminishes the effectiveness of loss spreading.<sup>93</sup> Loss spreading is predicated on the notion that manufacturers are able to pass on increased insurance costs by raising the prices of products.<sup>94</sup> All fifty states and the District of Columbia have commissions with regulatory authority over public utilities.<sup>95</sup> These state commissions function as retail rate-setters.<sup>96</sup> Nearly every state statute governing public utility rates requires the establishment of just and reasonable rates.<sup>97</sup> Specifically, state statutes give commissions the power to require electric utilities to file rate schedule changes which are subject to the approval of the commissions.<sup>98</sup> Given the burdens of the administrative process and the discretion of the commissions to reject rate increases, "manufacturers" of electricity will not be able to raise their prices as easily as manufacturers in the free market.<sup>99</sup>

States generally grant public utilities limited monopoly status.<sup>100</sup> Public utilities' status as monopolies undermines the objective of discouraging consumption of hazardous products.<sup>101</sup> Strict products liability reduces the consumption of hazardous products by increasing the prices of risky products,

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91. James A. Henderson, Jr., *Coping With the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931-32 (1981). Henderson also asserts that reducing the transaction costs of operating the accident reparation system is an objective of strict products liability. The rationale is that the cost of lawsuits will decrease because the plaintiff will not have to prove negligence. *Id.* at 931, 933. Aside from these economic rationales, Henderson notes that courts have often justified strict products liability based upon fairness. However, Henderson indicates that the issue of fairness is more applicable to a negligence action, and that the allocation of accident losses to producers irrespective of fault is primarily a means of reducing social waste, rather than a means of achieving fairness. *Id.* at 934-35.

92. *See infra* notes 93-116 and accompanying text.

93. *See infra* notes 94-99 and accompanying text.

94. Henderson, *supra* note 91, at 934.

95. Holmes, *supra* note 5, at 186.

96. Holmes, *supra* note 5, at 186.

97. Holmes, *supra* note 5, at 186.

98. *See, e.g.*, MO. REV. STAT. § 393.140 (1994).

99. *See* *Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 841 (Ohio 1988); Boyle, *supra* note 26, at 873; Holmes, *supra* note 5, at 190.

100. Holmes, *supra* note 5, at 190; *See e.g.*, MO. REV. STAT. § 393.106 (1994).

101. *See infra* notes 102-03 and accompanying text.



and thus, places them at a disadvantage in the market.<sup>102</sup> Given an electric utility's monopoly in providing electricity, there is no market in which the utility can be in a disadvantageous position; therefore, there will be no decrease in the consumption of hazardous products.<sup>103</sup>

Applying strict products liability to electric utilities also fails to serve the objective of encouraging investment in product safety.<sup>104</sup> In theory, manufacturers have the same financial incentives to create safe products under either a negligence or a strict liability regime.<sup>105</sup>

However, those advocating strict products liability suggest that manufacturers escape a significant portion of negligence based liability because a negligence action presents the plaintiff with difficult issues of proof.<sup>106</sup> "Knowing that the average plaintiff has difficulty establishing negligence, manufacturers may be willing to bet on escaping liability, or at least large judgments, and thus may limit their efforts to reduce products risk."<sup>107</sup>

Although manufacturers in other industries may be escaping liability by relying on the plaintiff's failure to carry the burden of proof, the heavy regulation of electric utilities should deter this from occurring at an electric utility.<sup>108</sup> For example, a Missouri statute provides that the Public Service Commission can do, *inter alia*, any of the following: examine or investigate the methods of supplying electricity and order that reasonable improvements which will best promote the public interest be made, investigate and have access to all parts of an electric utility's plant, prescribe uniform methods of keeping accounts, records, books, and memorandum and have access to any employees

102. Henderson, *supra* note 91, at 933.

103. This is particularly true in the case of the electric utility which not only has a monopoly, but a monopoly on a necessity.

104. See *infra* notes 105-16 and accompanying text.

105. Henderson, *supra* note 91, at 932. "Exposure to liability for negligence will pressure a rational producer to the point where marginal costs of accident avoidance equal marginal costs of accidents. Negligence law should pressure the producer to invest optimally in research for hidden hazards, *i.e.*, to the point, but not beyond, where the marginal expected injury costs equal the marginal costs of testing. Even if strict liability were imposed on such a producer, no greater investment in research would be made because it would be cheaper for the producer to insure than to keep testing." Henderson, *supra* note 91, at 932 n.58. See generally Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

106. Henderson, *supra* note 91, at 932. Henderson indicates that manufacturers may be able to destroy evidence such as adverse test results and frustrate plaintiffs' attempts to demonstrate that the defendant knew of the hazards. Henderson, *supra* note 91, at 932.

107. Henderson, *supra* note 91, at 932.

108. See *infra* note 109 and accompanying text.

and documents for examination or inspection.<sup>109</sup> If the Commission orders improvements which support the public interest, inspects or prescribes documentation, and focuses on the methods of an electric company, strict products liability will not provide a greater incentive for safety than that which already exists under the regulations. Furthermore, the regulations should prevent evidence of negligence from disappearing as might be the case in industries without regulation regarding examination, inspection, and documentation. Thus, electric companies will not "bet on escaping liability" by practicing less safe alternatives in hopes of making a larger profit.

Perhaps the most overlooked reason why applying strict products liability to electricity would not result in a greater investment in safety by electric utilities is that utilities already supply electricity incredibly safely.<sup>110</sup> The population of the United States in 1990 was 248,718,301.<sup>111</sup> Undoubtedly, almost all of the population encounters electricity on a daily basis, and each day many are exposed to electricity for more time than they are exposed to any other "product."<sup>112</sup> Yet, despite its mass consumption and lethal nature, electricity causes only 1700 deaths each year.<sup>113</sup> The percentage of people which electricity injures or kills approaches zero.<sup>114</sup> Electricity is already virtually 100 percent safe.<sup>115</sup> Thus, even if strict products liability were applied to electric utilities, the utilities would not have an increased incentive to invest in safety because the marginal cost could not be justified when compared to the marginal benefit.<sup>116</sup>

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109. MO. REV. STAT. § 393.140 (1994).

110. See *infra* notes 111-15 and accompanying text.

111. THE WORLD ALMANAC AND BOOK OF FACTS 1997 at 381 (Robert Famighetti, ed., 1996).

112. Although statistics in this area are unavailable, electricity seems unique in its pervasiveness. For example, while a homeowner is at work exposing himself to electricity, his home is also being supplied with electricity.

113. See *supra* note 5 and accompanying text.

114. 1700/248,709,873 equals approximately .0007%. While accurate statistics on how many people electricity injures are not available as injuries often go unrecorded, even if electricity caused 100 times more injuries than it did deaths, the total percentage of people who encounter electricity who are injured by it would still be only .07%.

115. See *supra* note 110-14 and accompanying text.

116. Henderson indicates that, in theory, strict liability will provide no greater incentive to invest in safety than negligence because in either case the manufacturer will only invest up to the point where the marginal cost of adding extra safety is equal to the marginal accident costs saved. See *supra* note 105 and accompanying text. See also JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 552-54 (4th ed. 1994).

Henderson states:

Moving from negligence to strict liability in theory will not cause actors to

Finally, electricity's excellent safety record belies the notion that strict products liability would be valuable because it would help plaintiffs win cases where negligence actually existed but could not be proven, because it displays that there are very few cases in which negligence exists in the first place.

## VI. CONCLUSION

Negligence is the dominant regime of American tort law.<sup>117</sup> When compelling policies exist,<sup>118</sup> courts lift the general rule of negligence and impose strict liability. Although these compelling policies generally exist in the area of products, they do not exist when applied to an electric utility's supply of electricity.<sup>119</sup> Thus, courts should hold that the supply of electricity is a "service," rather than a "product," for strict products liability purposes, and base an electric utility's liability upon negligence.

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act any more carefully. Under negligence, actors will invest a socially optimal amount in accident avoidance. The costs of accidents that continue to occur even after such optimal investment—the 'residual' losses not deemed worth avoiding through further precautions—will remain on the victims of such accidents. But, even if actors were held strictly liable for all accident losses, including such residual accident costs, they would not increase their investment in care. Instead, because the residual losses are, by hypothesis, cheaper to incur than to prevent, actors under strict liability will simply pay for such losses (through insurance perhaps) rather than make the additional investments in safety necessary to avoid them.

*Id.* at 552-54. This theory would be particularly true if the product is already extremely safe because at this level of safety it becomes very expensive to discover and implement new safety techniques, while the marginal accident costs cannot be reduced significantly as they are already very low. In other words, at electricity's level of safety, the residual losses would be much cheaper to incur than to prevent. Henderson's Table 6-1 displays why residual losses become so high as the level of safety increases. *Id.* at 553

117. See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 550 (4th ed. 1994).

118. Compelling policies include the spreading of the cost of losses due to accidents, providing greater incentives for safety, and reducing the consumption of hazardous products.

119. See *supra* notes 93-116 and accompanying text.